United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2388

ORIGINAL

To be argued by
JESSE MOSS

In The

United States Court of Appeals

For The Second Circuit

RAYMOND E. KARLINSKY, HOWARD JACOBSON, HARRY M. HATCHER and HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC., on behalf of themselves and all others engaged in the business of owning, training and racing thoroughbred horses in the United States, who are similarly situated,

Plaintiffs-Appellants,

- against -

THE NEW YORK RACING ASSOCIATION, INC., JOCKEY CLUB, JOHN C. CLARK, JACK J. DREYFUS, JR., JOHN G. GALBREATH, FRANK M. BASIL, G.H. BOSTWICK, JOHN W. HANES, FRANCIS KERMAN, ROBERT J. KLEBERG, JR., JOHN A. MORRIS, PERRY R. PEASE, OGDEN PHIPPS, JOHN M. SCHIFF, ALFRED G. VANDERBILT, JOSEPH WALKER, JR., AND JOHN H. WHITNEY,

Defendants-Appellees.

On Appeal from a Judgment of the United States District Court, Southern District of New York.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Docket No. 74-2388

This is an appeal from a judgment of the District Court rendered by Hon. Whitman Knapp, dismissing the complaint herein upon the ground that an anti-trust violation had not been proved. A further appeal is taken from the denial of plaintiffs' motion to have this proceed as a class action, upon the sole ground of the timeliness of the motion, Neither decision has been reported.

With respect to the appeal from the dismissal of the case, it will appear that there is little or no dispute as to the facts, most of which were elicited from the defendant's officers and trustees; it is based upon the failure of the the trial Court to recognize the implications of the evidence before it.

THE COMPLAINT

The complaint alleges an anti-trust conspiracy among the Jockey Club, a private organization which has assumed wide control of thoroughbred

racing as a regulatory body (142 a - 152 a) (and acted as such in New York until the advent of the pari-mutuel laws and State Racing Commission), the New York Racing Association, (hereafter referred to as NYRA) which operates all of the major thoroughbred tracks in the State, and individual defendants who were both the trustees of the NYRA and stewards or members of the Jockey Club.

Through the ownership and operation of the racetracks by NYRA and the various powers of the Jockey Club, the defendants have and exercise control over every aspect of racing in New York, including who may race here and when, the nature of the competition, purse payments and decisions which substantially affect the horsemen's chances of success and the amount of their earnings. (24 a - 25 a).

The complaint further alleges that the NYRA, which was created by the Jockey Club to control

all racing in New York, has always been controlled and/or influenced by the Jockey Club which designated all of the original twenty trustees who, up to the time of this action, have always named successor trustees exclusively from the rolls of Jockey Club members.

Most of the trustees of NYRA, in addition to acting in that capacity, own horses and engage as private individuals in the business of operating private racing stables, (100 a - 102 a) and compete at the New York tracks for the purses and under the conditions fixed by them, as trustees, against the other horsemen racing there. Further, racing in New York, which they control as trustees, is structured to favor their private fortunes as horsemen at the expense of their competitors, by stall allocations, purse distribution and the nature of the racing programs.

In denying a motion to dismiss, the

District Court held (52 RFD 40, 1971, Lasker, J.) that the amended complaint states a cause of action, with respect to all defendants except the Thoroughbred Owners and Breeders Association, Inc., and Record Publishing Company, Inc. who were then excluded from this action because of their First Amendment privilege. During the trial, by agreement of the parties Plaintiff Harry M. Hatcher (75 a) and defendants James C. Brady, Christopher C. Chenery Walter D. Fletcher, Harry F. Guggenheim, Gerard S. Smith were also dropped from this action (103 a).

The complaint demands that the defendants be enjoined and restrained from engaging in the acts complained of causing monopolization and restraint of trade and further, for recovery of the damages suffered by plaintiffs.

THE OPINION OF THE COURT BELOW

The Court below wrote no opinion in support of its decision. However, from various remarks

made by it during the course of the trial in discussions with counsel and in mentioning "tentative" findings of fact which it comtemplated, we can spell out the thinking which led to its decision. These may be fairly summarized as follows:

1. Since the monopoly power exercised was obtained by defendants through legislative action by the State, this disposed of the question of unlawful monopoly power exercised by the defendants, and the Court would not or could not question it (128 a - 129 a, 134 a, 185 a, 522 a).

2. Even though the individual defendants might be aware of their private interests and lean toward their furtherance in making their decisions and creating the pattern of racing in New York, this is not sufficient to impose liability. There must be evidence of what the Court called "hanky-panky", which it seemed to define as open, explicit demands for corrupt acts by their employees, or

openly corrupt actions by themselves (410 a, 525 a - 526 a).

3. The Court advanced the esoteric (and we believe novel) theory, that even if the monopoly power was used to benefit and advance the private interests of the individual defendants at the expense of other horsemen, if this was the result of the unconscious human tendency to favor one's self, the anti-trust laws have not been violated. (223 a, 228 a). To paraphrase the famous historical remark of President Wilson, what the Court seemed to require was evidence of "open corruption, openly arrived at." (225 a, 525 a - 526 a).

This appeal is based upon the theory that these views of the Court below, upon which its decision was based, are entirely erroneous and show a lack of understanding of the purposes of the anti-trust laws, the meaning and purpose of the evidence in this case, and the nature of the proof necessary

to show an anti-trust conspiracy. We shall argue:

1. We are not concerned here with the power of the State to condone a violation of the Sherman Act, which in itself would be questionable as a defense. The Court below missed the point, so easily grasped and clearly expressed by Judge Lasker in his opinion sustaining the complaint here when he said: "...the complaint here is adequate because it does not assail the existence of legally conferred powers, but the concertedly unlawful use of such powers by defendants with the alleged intention and result of injuring the plaintiffs." (52 RFD 40 at 47).

2. The cases recognize that an anti-trust conspiracy is not likely to be proved by explicit agreement to act wrongfully, but rather by the course of conduct of the parties involved.

3. Where the format of racing created by the monopoly power possessed by defendants, is

geared to benefit them at the expense of their competitors and/or does so, an anti-trust violation exists and speculation that they did so as a result of an "unconscious" desire to benefit themselves is fruitless. If they created a system of competition which helped themselves, this is sufficient, without wondering whether the desire and its fulfillment were subconscious.

I

A. DEFENDANTS EXERCISE AN UNLAWFUL MONOPOLY POWER OVER THOROUGHBRED RACING IN NEW YORK.

B. THIS IS THE RESULT OF THE CONCERTED ACTION OF THE JOCKEY CLUB AND THE OTHER DEFENDANTS.

C. THE MONOPOLY POWER IS USED TO BENEFIT THE INDIVIDUAL DEFENDANTS AT THE EXPENSE OF THE OTHER HORSEMEN AGAINST WHOM THEY COMPETE.

A

DEFENDANTS EXERCISE AN UNLAWFUL MONOPOLY POWER OVER THOROUGHBRED RACING IN NEW YORK.

As operator of all of the New York tracks, the New York Racing Association has complete control of all racing in New York in all of its aspects. By

granting or withholding stall space to horsemen wishing to compete here, it determines who may or not race in New York, for how a long a time and under what conditions (84 a - 89 a 90 a - 91 a). It decides the nature of the racing program and the types of horses which may compete in them. Its racing secretary programs the types of races to be run, the conditions of the specific races and substantially determines which horses shall compete against each other in a race (90 a - 92 a). It sets the purse structure; i.e., how much shall be offered for each track, each race and type of race, how much for stake races as contrasted to regular overnights (214 a - 216 a).

In the conduct of racing itself an equal control exists. Two of the three stewards who govern all activities at the track, are appointed respectively by the Jockey Club and the NYRA (152 a). All judges and other officials are appointed by the NYRA,

subject to the approval of the Racing Commission, and dischargeable at the sole pleasure of the NYRA (182 a - 184 a, 153 a). Among these officials is the handicapper, whose decision as to the weight each horse must carry, concededly has a substantial effect on the on the outcome of the race (86 a, 251 a). It is also conceded that this is a matter of judgment subject to frequent and substantial differences of opinion (18a - 87 a, 251 a).

This state of facts leaves little doubt that the defendants do have complete monopoly control of racing in New York and that their judgments and decisions affect not only the opportunity to race, but the probable successes and earnings of all horsemen who compete here.

> "Monopoly power carries with it the power to exclude competition wholly, or to permit competition on terms dictated by the monopoly."
>
> Twentieth Century Fox Corp. v. Goldwyn, 328 F. 2d 190, 218 (9th Cir.) cert. den. 85 S. Ct. 143.

Actually, the Court of Appeals of the State of New York has held specifically that the NYRA has a virtual monopoly of thoroughbred racing in New York. Jacobson v. NYRA 33 NY 2d 144 at 149, 350 NYS 2d 639 at 642.

Since this control is so clear and pervasive, defendants seek to justify it, not by denying its existence, but by claiming its legitimacy. These arguments (adopted by the trial Court) are that (1) these powers were acquired as a result of legislative action and therefore are not subject to attack and (2) in any event, they were not used unfairly to promote their own benefit vis a vis other horsemen against whom the trustees compete.

The theory of the complaint and proof needs emphasis here. It is most important to make clear the capacity in which the defendants were acting in promoting and pursuing their conspiracy

in restraint of trade. Owning and operating racetracks is one business; the business of racing horses in competition against others for the parimutuel purses offered is quite another, and when power to operate racetracks which may have been legitimately acquired, is misused to benefit the individual defendants in their entirely different personages as stable owners competing at those racetracks against other horsemen, there is an illegal assumption of power illegally used.* This was the point made by Judge Lasker (ante, p. 7).

It is well established

> "that the use of monopoly power however lawfully acquired

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*The testimony is clear and undisputed that entirely apart and distinct from the business of operating racetracks and managerial powers adjunct to that business, most of the trustees of the NYRA were also engaged as private individuals in the business of owning racing stables and racing their horses aginst other horsemen competing at their tracks (100 a, 101 a, 104 a).

to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." (emphasis supplied)

U.S. v. Griffith 68 S. Ct. 941 (945) 334 U.S.S. 100

Space

"Combination which unreasonably limits competition which would otherwise exist between persons in similar businesses is illegal. A suppression of competition necessarily restrains commerce (citing case). The purpose of the anti-trust laws - an intendment to secure equality of opportunity - is thwarted if group power is utilized to eliminate a competitor who is equipped to compete."

William Goldman Theatres v. Loew's 150 F. 2d 738

"Sanitary used the economic power of its position as a producer cooperative to acquire the Quality of O'Fallon plant. It then used control of Quality of O'Fallon plant to put itself in the position of being both a competitor with and a supplier to milk processors in St. Louis and St. Louis County."

Sanitary Milk Products, 241 F. Suppl 476 (483) aff'd 368 F. 2d 679

It would appear therefore, that the

oft-repeated contention of the defendants and the Court below, that because these powers, undeniably monopolistic, were conferred upon the defendants by the legislature, as operators of the New York racetracks, they and their use are notsubject to this attack, is not supportable. The implied corollary suggested by the District Court, that the legislature must have known that the individual horsemen defendants would proceed to race against others under their own domination (185 a) and might be likely to favor their own interest in fixing the nature of the competition (223 a, 227 a - 228 a) and that therefore even this is not subject to attack, is even more of a shocker (223 a, 227 a - 228 a, 524 a).

> "It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum total of acts

which are relied upon to effectuate the conspiracy which the statute forbids they come within its prohibition."

American Tobacco Co. v. U.S.
66 S. Ct. 1125 (1139) 328
U.S. 781

"But even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Act."

Milk Producers v. U.S.,
362 US 458.

"This title condemns every means, no matter how novel, to accomplish the objective of carrying out a conspiracy to restrain or monopolize trade."

U.S. v. N.Y. Great A & P
Tea Co., 137 F. 2d 459.

B

THIS IS THE RESULT OF THE CONCERTED ACTION OF THE JOCKEY CLUB AND THE OTHER DEFENDANTS.

The genesis of the New York Racing Association, the influence of the Jockey Club in forming it and in continuing to act in concert with the Racing Association in controlling racing New York

for the mutual benefit of themselves and their members, is plain in the record.

In 1955, racing in New York conducted at various private tracks, had been declining, in large part because of the physical deterioration of the track properties which, it seemed the owners were unable or unwilling to rehabilitate (336 a). At a Jockey Club dinner, the then chairman of the Racing Commission stated that racing in New York was not satisfactory and that they had better do something about it. Following this the defendant, Phipps, then vice-president of the Jockey Club, appointed a committee of three Jockey Club members to come up with a plan for the rehabilitation of racing (190 a - 191 a, 337 a, 536 a - 546 a).

The result of this was the so called Jockey Club Plan submitted to the New York legislature, which provided for the formation of a corporation which came to be known as the NYRA, to take over

the then existing tracks, to eliminate some of them and to restructure and operate the others (191 a - 192 a). The money for the acquisition of the other tracks and operating them was to be acquired by borrowing, secured by a portion of the pari-mutuel receipts as to which the State deferred its share for the purpose of enabling these funds to be pledged as collateral (195 a - 196 a, 553 a - 554 a).

Significantly, in structuring the NYRA which was to be governed by twenty trustees, the Jockey Club Plan provided that the stock ownership of the new corporation would be vested in the Jockey Club and furthermore that the trustees must be chosen from the membership of the Jockey Club; no one not a member of the Jockey Club would be eligible to become a trustee of the NYRA. 1954 New York State Racing Commission Report to the Secretary of State p.19 The Legislature rejected this provision of the plan, to the dismay of the Jockey Club. The Defendant

Hanes, the sole surviving member of the Jockey Club Committee, testified that he thought there was a moral commitment on the part of the State to let the Jockey Club choose the trustees and that it should not have stricken this provision(546 a).

In fact, the Jockey Club and the trustees of the NYRA accomplished this very purpose by acting in concert among themselves. The original twenty trustees were named by the Jockey Club Committee, entirely from the Jockey Club membership (193 a, 331 a). Thereafter, it appears that with one possible exception*, up to the time of this lawsuit, never was a trustee of the NYRA chosen who was not also a member of the Jockey Club(331 a). Mr. Vanderbilt,

---

*Jack Dreyfus became a trustee first and shortly thereafter a member of the Jockey Club. 34 a, 288 a, 331 a

chairman of the Board of Trustees and a member of the Jockey Club, testified that up to 1969, not only was there never a member of the Board who was not a member, of the Jockey Club, but that this was by design and not coincidence (290 a, 291 a). He pointed out (presumably in mitigation) that there had been changes since the institution of this action, when for the first time, non-Jockey Club members became Trustees, but the impact of this was diluted when he agreed that this might be due to the very fact that this action was brought (317 a - 318 a).

The desire of the Jockey Club to control the appointment of the Trustees of the Racing Association, the refusal of the State to agree to this, the feeling of the Jockey Club that the State was wrong, followed by a course of conduct which accomplished that same result intended by the defendants, establishes the concerted action necessary to establish a monopoly, required by the anti-trust

laws.

> "No formal agreement is necessary to constitute an unlawful conspiracy. ...The agreement may be shown by a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose ... It is the common design which is the essence of the conspiracy or combination; and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but always leading to the unlawful result."
>
> American Tobbacco v. U.S. 146 F 2d 93 at aff'd 328, 107 U.S., 781, 66 S. Ct. 1125

The closeness of the relationship between NYRA and the Jockey Club, appears in other minor ways. For example, as we have seen, the Jockey Club and the NYRA each appoint one of the three stewards. Since 1970 Nathaniel Hyland had been the NYRA steward. In 1972 the Jockey Club steward left to become Secretary of the Jockey Club. Thereupon the NYRA steward, Hyland, was named by the Jockey

Club as its steward and his position as NYRA steward was now filed by Patrick O'Brien an NYRA vice president (92 a, 93 a, 211 a) Surely, these mutual accomodations show a continuing dialogue in which they jointly guide the racing monopoly.

The closeness of the two entities again appears in the testimony that the New York Racing Association used a portion of the compulsory pony lead fees required of the horsemen, for the support of the Jockey Club Foundation, an arm of the Jockey Club, although no conceivable justification appears for this use of its funds (205 a, 209 a).

C

THE MONOPOLY POWER IS USED TO BENEFIT THE INDIVIDUAL DEFENDANTS AT THE EXPENSE OF THE OTHER HORSEMEN AGAINST WHOM THEY COMPETE

The evidence indicates that racing in New York has been structured primarily to meet the needs of defendants, to provide the kind of racing programs which they enjoyed and found most profitable and to program the kind of racing in which they could most successfully compete against other horsemen.

The Jockey Club members and trustees who raced horses, were variously described as affluent, owners of the more expensive horses, owners of a large percentage of stake horses and participants in almost every stake race, involved in breeding more than most horsemen and consequently the owners of a disproportionate number of two-year olds in whose racing they were interest(124 a, 136 a, 140 a, 141 a, 362 a). When we compare these characteristics with the form of the racing structure in

New York, we find that the requirements of this group have been catered to at the expense of their competitors and without economic justification.

1. Stall Space The Trustees use their powers to allocate stalls to favor themselves. The New York area is probably the most desirable racing area in the United States and is sui generis in the quality of the racing and the purses paid. (81 a - 82 a, 272 a - 273 a, 360 a). Consequently, there is a greater demand for stalls by horsemen wishing to compete here than can be satisfied, and stalls are in short supply. Stalls are allocated by the Racing Secretary, appointed by the Trustees. (87 a, 89 a). An examination of the records for the three year period preceeding the institution of this lawsuit reveals the followng:

Of all stalls requested by members of the Jockey Club or Trustees of the NYRA, 88% were granted. Of stalls requested by all other horsemen, 73% were granted. (Plaintiffs Exhibit 25, 575 a)

Despite the fact that an important consideration in the granting of stalls is the extent of participation in racing by the horses stabled in them (181 a 361 a) it appears that stalls granted to horses owned by Jockey Club NYRA Trustees are used less for racing than stalls allocated to other horsemen. Thus, the number of starts per stall granted to members was 1.58; for nonmembers it was 2.97 (Plaintiff's Exhibit 26,576 a) The number of horses starting at all from each stall allocated to members was .53; for nonmembers it was .81. (Plaintiff's Exhibit 26, 576 a)

So that the poor record of usage of the stalls which Jockey Club members asked for and received, as compared to use by other horsemen, is established as a plain matter of record. Whether they got the stalls and didn't use them or whether they used them to stable horses which did no racing does not appear.

Most significant (the significance will

be discussed subsequently in connection with the Saratoga meeting) when stalls were allocated for Saratoga, the percentages change drastically. For here it suddenly appears that 94% of the applications by Jockey Club NYRA members were granted, while the percentage for nonmembers dropped to 58%. (Plaintiff's Exhibit 25, 575 a)

Stall allotments for two year olds show a variation from the practice at other tracks. Two year olds are uncertain starters and a substantial portion of them drop out for various reasons and so do not race (353 a). For this reason, many tracks restrict the number of two year olds allowed on the grounds in order to use the stalls for horses which participate in the racing program and enable a satisfactory program to be presented and filled (136 a, 138 a). The New York Racing Association has not limited the number of stalls allocated for

two year olds which the owners may wish to bring in(135 a - 136 a, 139 a). The testimony was that the type of owner (the "affluent owner") such as the Trustees of the NYRA, was more apt to engage in breeding horses as well as racing them and was more apt to have large numbers of two year olds(140 a - 141 a, 361 a - 362 a). It was also testified that often these stalls were used for the conditioning and training of two year olds who did not race, at times when other horsemen with horses ready to engage in racing, were being denied stalls(324 a - 325 a).

2. <u>The Racing Program</u> The Racing Secretary each year submits to the Trustees a proposed stakes program which is discussed by them(217 a, 332 a-333 a). This is the extent of their interest(215 a, 265 a, 266 a). After the stakes program and its purses have been decided upon, the regular overnight program

is customarily left to the Racing Secretary.* (215 a).

Matters such as the number of stakes, the amount of purses to be offered for them, the distance of various races, and whether they should be run on grass or dirt, are matters which come up for discussion and about which the Trustees express themselves (219 a 220 a, 334 a). Some horses run better and are more successful over longer distances than shorter ones and the opposite is also true (229 a 262 a 301 a, 334 a). It was also testified by everyone that some horses run better in grass races than on dirt and vice versa (229 a, 303 a, 334 a). The chances of a horse in winning races would be substantially affected by these factors. It was

---

*The Trustees can take up the regular overnight program but do not care to do so. Only once have they made a suggestion which regard to it and that was to increase purses for some races for the more expensive horses (217 a - 218 a).

stated by the defendant Phipps that the Trustees who discussed and voted on the question of whether or not they should have more grass races as contrasted to sprint races, owned horses whose chances of winning races would be affected by these decisions of the Board (334 a).

The importance of these decisions in affecting the outcome of the racing competition is underlined by the testimony of Mr. Vanderbilt, who testified that one of the reasons for the discharge of the previous racing secretary had been his disagreement with Mr. Vanderbilt about the desirability of carding more races at greater distances (296 a - 299 a). While other reasons were also given for the trustees' decisions as to distance and grass racing, it is undisputed that the competitive chances of their own horses were involved. Perhaps the most damaging statement with respect to the attitude of the Trustees in making this decision came from the lips of one of the defendants

who in discussing the actions of the trustees at their meeting, said:

> "Question: Do you think it would be to the advantage of people who own stake horses to have more grass races?
>
> "Answer: Again, that depends on the horse. You have horses for courses and courses for horses. If you have good grass horses that don't run well on grass, then you want dirt races. That's human nature."
>
> "Question: And would human nature also indicate that if you had a lot of stake horses you would like to see stake payments eased?"
>
> (Colloquy between Counsel and Court)
>
> "Answer: Why, sure. And you would like to have the added money increased. What is it --- elementary, dear Watson? Was it Dr. Watson and Mr. Sherlock Holmes?" (280a - 281a).

Mr. Vanderbilt agreed that this was a valid statement (303 a, 304 a).

The preoccupation of the Trustees with stake races also appears to be connected with their personal advantage in racing against other horsemen, for it was testified that the Trustees were for the most part the kind of horsemen who owned the stakes horses so that their self-interest appears inseparable from their decision making (140 a - 141 a, 361 a - 362 a). Mr. Hyland testified that one or more Jockey Club members participated in almost every stake race run (125 a).

3. The Saratoga Meeting For twenty-four days each August, a meeting is held at Saratoga. The attendance and handle are small but for sheer lavishness, social standing and extravgance, this meeting is without equal in the United States. The evidence shows that to a substantial extent, this

meeting is a treat which the Jockey Club/NYRA trustees give themselves at the expense of all the other horsemen who race in this State.

It was testified by one NYRA witness that you can read about as much about the Saratoga meeting in the society pages of the newspapers as you could in the sporting pages (173a). It was also testified that there were more Jockey Club members participating in Saratoga than at any other race meeting in the world (198a, 233a, 306a). In the words of still another trustee in decribing that meeting, "everybody is there" (536a, 562a).

The Saratoga meeting not only is different from any other race meeting in the world but is paid for out of the handle earned at Belmont and Saratoga by the horsemen racing there, for the benefit of the predominating Jockey Club elite racing at Saratoga, (197a-199a, 267a).

At Saratoga there is heavy emphasis on two year old racing which especially caters to the requirements of the trustees and Jockey Club members who have many more of these horses (232a-233a, 427a, 430a).

Contrary to defendants' claims that the Saratoga meet enhances Aqueduct and Belmont racing, the testimony was that it is traditional for some stables to race exclusively at Saratoga because of the two year old racing there (172a).

a. Thus, at Saratoga there is a stake race every day, as compared to two a week at Belmont and fewer at Aqueduct (232a-233a). As we have seen, the Jockey Club NYRA trustees are the ones primarily interested in stake racing. The proportion of money paid out for stakes compared to overnights at Saratoga is also exorbitant by all usual standards (114a-115a, 197a, 199a, 267a).

b. For the Saratoga meeting, the percentage of stalls granted to members rose to an astronomical 94% while those to non-members dropped to 58% (Plaintiff's Exhibit 25, 57a). Obviously, since the stables concerned are the same, this is explainable only by the desire of the Jockey Club NYRA trustees

to continue the Saratoga spectacular as their cosa nostra.

c. Shipping horses to Saratoga is expensive and whereas the NYRA pays for shipping horses from track to track as between Belmont and Aqueduct it does not do so for shipping to Saratoga (306a, 424a). This has an obvious tendency to discourage the ordinary horseman and to leave the field for the more affluent; not only because of the shipping expenses but because the type of racing (the prepondance of stakes and two year old races) give the affluent owner more of an opportunity to win money with which to pay his expenses and make a profit (358a). The answer made by defendants was that neither does the NYRA pay the expenses of shipping to Saratoga for its own trustees (318a-319a) which is what led to the by-play in the record about Anatole France's remark about the bridges of Paris (319a).

d. The purses paid at Saratoga bear no

relationship to its handle and in some cases have actually amounted to 107% of the track's total retention(Plaintiff's Exhibit 8, 115a). The significance of this became more apparent when we see that by law the NYRA pays out in purses 3% of the entire annual handle(116a). By reason of the exorbitant payments at Saratoga, which go substantially over 3% (4842) they necessarily pay a substantially lesser amount than 3% at Aqueduct and Belmont(482a) In other words, the horsemen at Aqueduct and Belmont are compelled to race for an average of 2.28% instead of 3%, while those racing at Saratoga race for an average of 5.94%. Moreover, despite the absence of an appreciable attendance or handle, the actual average daily dollar amount paid out as purses at Saratoga, is frequently in excess of that paid at Aqueduct and Belmont. The money is taken from the horsemen racing at Aqueduct and Belmont for those privileged to race at Saratoga, even though the money is generated by

them at the former tracks (197a-198a).

Defendants' glowing description of what a wonderful thing the Saratoga meeting is, suggests the question; wonderful for whom? They concede, that unless they took the money from Belmont and Aqueduct to pay these incredible purse percentages, they could not get their people to come there to race (120a, 168a). The clear meaning of what they are saying is that while they want this lovely party, they are not willing to pay for it or bear its expenses, but want it paid for by the horsemen who generated the money by racing at Aqueduct and Belmont.

The defendants attempted to justify their extravagance at Saratoga by claiming that it is mandated by the statute. The legislation merely provides that the New York City tracks may not run simultaneously with the Saratoga meet (McKinneys Unconsolidated Laws §7977). There is nothing in the law which requires the Saratoga meet to be run at the expense of New York

City tracks nor is there anything which requires the NYRA to customarily pay out well over 90% of the Saratoga handle in purses. Saratoga could be run attractively on a scale appropriate to its true attendance and revenue generating capacity as many smaller tracks in the country do, completely in keeping with the governing legislation (429a-431a, 437a-438a).

Lest we appear to be ill-natured and carping about this, we quote from a very recent newspaper story, to indicate that this expensive party and the lavish purse awards which defendants give to themselves at the expense of the other horsemen, is generally recognized and unhappily swallowed by the racing public. The New York Daily News, in discussing possible racing changes said (November 17, 1974, at p. 29):

> "Noe, however, may find himself espousing a losing cause. In recent years, the main support for racing in the grand tradition, as conducted at Saratoga has

> come from the old-time stables. The Whitneys, Vanderbilts, et al, like its race and party there, but it is a losing proposition because of the high costs of food, housing, etc. at the upstate track."

Now even if the unusually great percentage of Jockey Club members showing up to race at Saratoga were entirely accidental, it would still be wrong for defendants to divert all that money from Aqueduct and Belmont to pay the higher purses and to provide the unusual kinds of racing that they give their colleagues at Saratoga. But in fact, the actual situation is greatly exacerbated, for we find that this large Jockey Club/NYRA trustees gathering at Saratoga is contrived by means of stall allocation, the kind of racing in which the money must be earned, and difficulties placed in the way of other horsemen who find it expensive and unrewarding to compete at Saratoga. The entire operation is slanted to facilitate participation for the desirables and close the door on the others as much as

possible. The new racing secretary seems to have conceded the injustice of this and the desirability of changing it(348a-350a). Again, after the commencement of this action.

The Handicapper While all of the racing officials are appointed by the trustees of the NYRA, the handicapper deserves special mention; this function is performed by the Racing Secretary. It was testified that the weights assigned by the handicapper have a substantial effect on the outcome of any race(86a). In all handicap races, he decides how much weight each horse should carry to equalize their chances and made it a fair race(84a-87a, 251a). This involves a matter of personal judgment as to just how many extra pounds each horse must carry against the competing horses. It was testified that there is room for differences of opinion here(251a, 294a)and that with respect to the same horses it was not unusual for the racing secretaries at different tracks to disagree(87a).

Such disagreements are not infrequent nor are disputes over this with the Racing Secretary. The vice in this situation becomes clear when we realize that the Racing Secretary assigns these weights both to horses owned by the trustees who hired him and those owned by the other horsemen against whom they compete. The testimony was that all trainers and owners approach the handicapper to argue with him about theweights assigned to their horses, including the trainers for the Trustees of the New York Racing Association, and Jockey Club members (87 a, 252 a, 294 a, 296 a)

It was apparent even to the trial Court that of course the racing officials were aware of who hired them and might have a leaning toward the boss in making their decisions. However the Court went on to say, erroneously, we believe, that anything short of a discernable, conscious and deliberate act of dishonesty in a specific instance, was insufficent, and that a system which, because of normal weakness of

human behavior, might result in an operation which worked to the advantage of the trustees, was not enough.

Another example of the monopoly power possessed by defendants and their misuse of it, appears in connection with their arrangement with the Jockey Guild to increase the fees which must be paid to the Jockeys by horsemen. The Jockeys' Guild wanted increased fees from the horsemen.(204 a) They then made an arrangement with the NYRA which, in writing its condition book, imposed a higher Jockeys' fee upon the horsemen.(235 a -236 a) This was done by agreement between the Jockeys' Guild and NYRA, an agreement in which the horsemen were not asked to participate, either by their organization or as a separate group.* NYRA was even willing to let the

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*A feeble effort was made on the trial to indicate that there was consultation with the horsemen but it then appeared that the only horsemen with whom this might have been discussed were two trainers for two trustees. (238 a, 241 a)

horsemen strike if necessary, so insistent were they upon imposing this fee schedule upon them (250a). Now clearly this is an anti-trust violation; namely, an agreement between the two groups to impose a price schedule upon the third group, the horsemen.

Regrettably, the Court here indicated again a failure to grasp the issue. To begin with, it seemed to consider this as an ordinary situation where a group threatened to strike, and, said the Court, aren't these things usually settled by giving them an increase and isn't this the thing to do in order to settle the Jockeys' demands (241a). The Court overlooked completely the fact that this was not a demand by the Jockeys' Guild against the NYRA, which the latter was meeting; it was a demand upon the horsemen which the Jockeys' Guild got the NYRA to force the horsemen to comply with.

It is not clear from the record whether the Court subsequently grasped this, but even so, the remainder of this portion of the record seems to indicate that its attitude was that if this was a

practical business way of meeting the situation, (249a-250a) there was nothing wrong with it, and the fact that this action was in violation of the anti-trust laws didn't seem to bother the Court or even to be considered as a possible flaw in the action which they took.

II

THE DISTRICT COURT FAILED TO UNDERSTAND THE NATURE OF THE PROOF REQUIRED IN AN ANTI-TRUST CASE

A colloquy between the Court and counsel for plaintiff, (221a-229a) sheds considerable light upon the views of the District Court which we believe to be in error. A small excerpt may crystallize this:

At page 223a:

> "MR MOSS: If your Honor please the theory of my case, which your Honor may very well disagree with, is that, subconsciously or otherwise, if they use this power to favor themselves, they are in violation of the law. It is as simple as that. That is our case.
>
> "THE COURT: It seems to me that it is a hard position to take in view of the fact that the legislature put them in that position.

And at page 228a-229a:

> "MR. MOSS: Whether consciously or

> subconsciously, your Honor, these people acted in a way using the power that was given to them to control these tracks, and if they acted in a way to benefit themselves as horsemen in their different capacities at the expense of their competitors, we say there has been an anti-trust violation. I know your Honor disagrees, but there it is.
>
> "THE COURT: I may not disagree when the case is over, but at this moment I do.
>
> "MR. MOSS: There it is."

It is not enough then, said the Court, to show the existence of monopoly power, used by these defendants to give themselves advantages over their competition in their role as horsemen. In addition to proving their espousal of a system which accomplished this, he thinks it necessary for plaintiff to prove that this was not the result of a subconscious

expression of a normal human desire to benefit themselves, but rather an openly expressed, consciously arrived at intention to act extra-legally to harm plaintiffs. The words "deliberately" and "subconsciously" appear frequently in his remarks to counsel and witnesses(223a, 225a, 226a, 227a, 228a, 410a).

Normally, when we prove an act by group A, which gives it an unfair competitive advantage over group B, to its profit and B's detriment, B has a right to recover.

The theory advanced by the Court is, that this is not enough because the desire of group A to help themselves at the expense of harming B may have been promoted by their subconscious. A corollary to this seems to be that, in addition to the anti-competitive activities of defendants, plaintiffs must prove that the motivation was not subconscious, and further, that this requires specific evidence of what the Court

called "hanky panky", by which term it seems to mean actual corrupt remarks and proposals (410a). This was absolutely incomprehensible to counsel and at that point he threw up his hands and merely proceeded to complete his record (413a).

In addition to this, throughout the recorc, the Court kept referring to the fact that the controlling powers exercised by defendants, were granted by the legislature and therefore not subject to attack, even though granted to them as racetrack operators (128a, 185a, 224a, 228a). This not only misses the point emphasized by Judge Lasker which has previously been discussed (ante, p.) but also ignores the substantial body of law on this subject.

> "Repeals of the anti-trust laws by implication from a regulatory statute are strongly unfavored... There is nothing

in the legislative history
which reveals a purpose to
insulate...from the operation
of the anti-trust laws.

Otter Tail Power Co. v. U. S.,
410 US 336, 347

"Monopoly power is not condemned
by the act only when it was un-
lawfully obtained. The mere
existence of the power to mono-
polize, together with the purpose
or intent to do so, constitutes
an evil at which the act is aimed."

Schine Chain Theatres v. U. S.,
68 S. Ct. 947 (958) 334 U.S. 110
also, see ante p ( )

The Courts' preoccupation with the need for overt statements, appears frequently. Thus, in questioning the new racing secretary (hired in 1971), the Court itself sought and elicited his testimony that when Mr. Vanderbilt hired him he told him he would have a free hand and did not discuss with him the matter of

putting on the kind of racing program favored by trustees (466a). And in its closing remarks the Court specifically mentioned that it was impressed by this and gave it great weight (525a-526a).

This indicates an almost incredible naivete. Just what did the Court expect the Chairman to say to Noe? Something like, "You know, old boy, the trustees expect you to see to it that we win a lot of these races?" [redacted]

The Court's attitude becomes even more astonishing when we remember that after having heard the defendants claim that this alleged non-interference was the way they always ran things, we find Mr. Vanderbilt specifically admitting that his reason for firing Trotter, the previous racing secretary, was that Trotter was reluctant to follow his suggestion that more distance races should be programmed (290a, 298a). Surely, this destroys the myth which the trustees try so hard to propagate, that they are removed from

this kind of interference. But the Court bluntantly disregards the evidence and accepts instead the unsupported contention of defendants.

> "In an action of this nature, it is important to consider that the conspiracy and combination are in most instances proven from circumstantial evidence. The usual facts are not at the disposal of the plaintiff for conspiracies and combinations are not apt to become common knowledge, making it extremely difficult for persons outside of the conspiracy or combination to obtain accurate details concerning it."
>
> Makan Amusement v. Treton-New Brunswick Theatre Co., 3 F.R.D. 429 at 431

> "Another rule to be borne in mind is that it is not necessary in a case of this kind that there be direct evidence of the existence of a conspiracy of the kind charged in the complaint. More often then otherwise, direct evidence of such a conspiracy is not available. But is may be proved by a development and collation of the circumstances. It may be inferred from the things said and done."
>
> Loew's v. Cinema Amusement 210 F 2d 86 at 90 cert. den. 74 S. Ct. 787, 347 U.S. 976 L.Ed. 1115.

"...a conspiracy such as was here charged raely can be proved by direct evidence from the participating parties themselves; relieance must be had upon the reasonable inference drawn from the conduct in the light of the surrounding circumstances."

Bordonaro Brothers Theatres v. Paramount Pictures 176 F2d 594 at 596-59

"But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and maybe in be inferred from the things actually done, and when in this case by concerted action the names of wholesalers were reported to the other members of the associations the conspiracy to accomplish that which was the natural consequence of such action may readily inferred."

Eastern States Lumber Ass'n. v. U.S., 613 234 US 600 at 612

Actually, so cocksure of themselves were the defendants that they made statements not normally to be hoped for by a plaintiff in this kind of a case, thus putting into the record even the sort of thing demanded by the Court:

1. We have seen the frank statement of Morris, that in designing the racing programs the trustees were guided by their own self-interest depending upon the kind of horses which they were racing at the time (ante p.). There is also Mr. Phipps' acknowledgement that at the time that decisions were made by the trustees they owned horses of the types which would be affected thereby ( ).

2. We also note again, Mr. Vanderbilt's testimony that he fired the racing secretary because he disagreed with him on programming more distance races. (ante p.) We remind the Court that distance substantially affects the chances of the horseman, including racing trustees, depending upon the horses they own at the time. (ante p. , 335a).

3. The specific incident related by Vanderbilt and Phipps with respect to Mr. Phipps' request for additional stalls at Saratoga. Mr. Phipps who had received all the stalls he had asked for at Saratoga, subsequently decided that he wanted some additional ones (307 a). The racing Secretary, Mr. Trotter, informed him that all the stalls had now been allocated and there were no more available for the

additional ones which Mr. Phipps wanted. Mr. Phipps spoke to Mr. Vanderbilt, the Chairman of the Board, about this and the latter took the matter up with Mr. Trotter, asking why Mr. Phipps couldn't have the extra stalls (307a). The stalls were not forthcoming because Mr. Trotter had truthfully said that it was impossible at that point to provide any, because there were no unallocated stalls left (307a).

Shortly thereafter, Mr. Phipps and Mr. Vanderbilt were present and voting at a Trustees' meeting which decided to dispense with Mr. Trotter's services (307a-308a, 341a, 459a). Now we cannot prove that this was cause and effect, although certainly it didn't help Trotter any. In any event, Mr. Vanderbilt had given another equally damaging reason for Mr. Trotter's discharge. But surely we are entitled to ask whether any ordinary horseman could have had the Chairman of the Board ask the Racing Secretary to give him more stalls and whether the

Chairman's request would not normally be complied with, although Trotter felt he couldn't do so in this case. What then are we to think of the claimed equality of opportunity?

The reason why the Court failed to give such testimony its obvious weight and significance has already been indicated; i.e., that judged by the standard which he had adopted on faith; that the trustees were not the kind of men who would do anything wrong, it was inconsistent with this premise and therefore unacceptable.

The Court's ultimate conclusion was that, since the defendants owned the better horses, their greater racing successes and earnings were explainable by this and we need not look further. To illustrate its point, it twice gave an example which rather conclusively exposes its failure to understand the issue.

Suppose (it said) that the members of the Harvard Law Review operated the school's job placement

office in charge of seeking and getting jobs for the graduating class. Since they were the top scholars, it would be natural and expected that they would do better than other students in getting jobs; the fact that they controlled the employment machinery has nothing to do with it - they would do better anyway (407a-408a).

The Court's supposititious case and the one before us are indeed comparable and the error is apparent in both. Undoubtedly the Law Review men would get more of the better jobs in any event. But now suppose that they were not satisfied enough with their natural advantages to play the game evenhandedly with equal opportunities to all; suppose they used their control of the placement service to increase their normal advantage and give themselves an additional edge in competing with the other students. Suppose, for example that when job openings came in, they withheld this information for twenty-four or forty-eight

hours, sifted through them and applied for the good ones themselves first, before letting the rest of the class know about them.

Does the Court below really believe that this makes no difference because the Law Review men would have done better than the others anyway. Would such a system be tolerated for a moment - especially where there was evidence that the structure which they controlled was being used to increase the advantage that the Law Review men already had.

Let us look now at our case. Let us agree arguendo that the defendants have good horses and might be expected to win more than the rank and file. But not satisfied with this, they use their power to impose a format under which they get still further advantages in the nature of stall allocations, racing opportunities and the kind of racing best structured to suit their horses - all at the expense of their competitors who are compelled to race against them

under conditions of the Trustees' choice.

The Court below said: It doesn't matter; they would have won more than the others anyway.

III

THIS ACTION SHOULD PROCEED AS A CLASS ACTION.

A. IT IS PROPERLY BROUGHT AS SUCH.

B. THE DISMISSAL SOLELY UPON THE BASIS OF THE TIMELINESS OF THE MOTION UNDER FRCP 23, WAS UNJUSTIFIED.

A.

It seems clear that the requirements necessary to maintain a class action are met in this case; perhaps it is even fair to say that this case particularly and peculiarly justifies a class action. Racing is a group activity which cannot be conducted in any other fashion. The various horsemen at the tracks engage in group contests for the prizes or purses which are offered, and no income can be earned except at the expense of other and unsuccessful contestants. There is not, and cannot be, any individual game plan or separate rules for each separate individual. The rules and their application necessarily apply to the field and the purses

are divided among participants according to their successes against each other. If racing is conducted in a manner which gives competitive advantages to one segment of the competing horsemen, this necessarily damages all the others en masse.

It follows from this that the prerequites listed in FRCP 23 (a) are fully met. The questions of law and fact raised by the complaint are common to all members of the class, and the claims and defenses of the plaintiffs are not only typical of, but indentical with, those of the class. That the action taken by the representative parties would fairly and adequately protect the interests of the class assured (1) by the fact that, as just shown those interests are indentical and further, (2) that one of the plaintiffs, HBPA, is an association which has long acted as the representative of the horsemen, whose action in bringing this lawsuit could not and would not have been taken in the first place, without

the desire of a majority of the class which we are discussing.

The HBPA is a horsemen's organization having a separate New York division, as it has in other areas of the country. As indicated in the affidavit of Eugene Jacobs submitted on the motion, (62 a) during the times in question it probably represented about 90% of the horsemen racing here. The term horsemen refers to owners and trainers. A majority of trainers frequently also own horses besides training for others. In any case, every horse on the grounds regardless of by whom owned, must under the rules of the Racing Commission, be under the management of a licensed trainer.

The HBPA has normally been recognized by the defendant, New York Racing Association, as the spokesman for the horsemen in any discussions disputes or arrangements which have required solution. This has also been true of the Racing Commission. Thus,

the defendants themselves, in submitting a memorandum as Amici Curiae in another case involving some of the same parties, said that, "most of the trainers" were members of the HBPA. In their pre-trial memorandum below they stated: (p.2) "Many of the owners and trainers with horses stabled at Aqueduct at that time were members of the HBPA." They said the same in their memorandum on the motion to dismiss in this case, and went on not only to admit, but to assert the response of the vast majority of horsemen to the HBPA.

In negotiations concerning a pension plan a few years ago, both the New York Racing Association and the Racing Commission dealt with the HBPA as representative of the horsemen and the same was true in 1967.

Also, up to the time of these disputes among the parties, the New York Racing Association recognized the legitimacy of the HBPA as the voice of the horsemen, by accepting authorizations from most of the horsemen, pursuant to which it deducted for the HBPA one percent of the purses won by them as their dues payments toward the support of HBPA. It appears clear, therefore, that the action taken by NYRA is in itself an indication of substantial support by the class on whose behalf these plaintiffs sue.

Thus, the desire of the class involved, to bring this action, seems clear. Subdivision (b) of Rule 23 lists a number of other requirements in the alternative, any one of which would be sufficient. The fact is however, that this action meets almost all of them.

Thus with respect to (b)(A), since the

methods of conducting racing are necessarily imposed upon the group, it would be impossible for an individual to bring an action which would not affect the group as a whole. Separate actions by indivuals who might be interested only in some selected aspects of defendants' actions, rather than their totality, could result in adjudications which would condemn certain activities of the defendants and not prohibit others. The result of such individual adjudications, or a series of them, could permit standards of conduct tailored to an individual idea which would then, nevertheless, be imposed upon all, and could impede the class in defining and restraining the kind of conduct which necessarily affects all members of the class. Not only would all individual members be benefitted by the result of a class action, but in fact there has been no indication whatever that any individual action has ever been contemplated by anyone.

To repeat, the horsemen in this case are

necessarily a group and must be treated as such. In the very nature of the activity there cannot be separate standards and courses of conduct for dealing with individual horsemen. This would not only impede any action brought for the benefit of the entire group, but would lead to an impossible situation. Accordingly, this class action is proper under subdivision (b) (1) (A) and (B).

With respect to subdivision (b) (2) it is perfectly clear that the actions are and must be applicable to the class as a whole because of the nature of racing as described.

This action is also appropriate under (b) (3). Obviously, an action of this nature, scope and expense, with its universal applicability should be a class action. Not only do common questions of law and fact predominate; they are identical. The interests of the individual in this case are the same as the interest of the group or class and

in fact, as demonstrated at the trial (r.). the damages accruing to the individual members of the class are calulated as their portion of the general group damage which is the basis of the action (481 a - 486 a). This is in contrast to class actions based upon an aggregate of separate claims. This litigation protects all rights accruing to all members of the group. There appears to be no other action or type of action as suitable to protect their common interests, nor has anyone every suggested that there was.

A very similar situation was presented in Berman v. Narrangansett Racing Association, 48 R.F.D. 333. There, individual horsemen sued on behalf of themselves and all other licensed owners of horses winning purses at certain racetracks during the previous thirty year period. In a preliminary motion the Court found that "the interest of the group of purse winners in the asserted right

is common and undivided." 414 F2nd 311, 315.

Here we have, in addition to the question of allocation of purse money, the issues of stall allocation and racing opportunities. As there are only certain numbers of stalls and racing opportunities available for each racing season, it is perfectly apparent that to the extent that one receives favored treatment in their allocation, other horsemen will suffer correspondingly.

In Berman, the Court found that because the class numbered thousands, clearly it could not be brought into Court by any joinder device. It stated that in a case where apportionment of purse money is involved (which is one of the issues in our action), the interests of the plaintiffs were common and undivided and that such a lawsuit was "not a collection of individual lawsuits brought solely for the convenience of the claimants."

Berman v. Narragansett Racing Association, 414 F2nd 311, 316. The Court also found that in view of the indentity of interest between the horsemen and the class that they represented, no serious question could be raised as to the indentity of the class for whose benefit the action had been brought.

Thus, this is a true class action fitting into several categories of Tule 23 (b). The law is settled that in such a case the class should be certified pursuant to Rule 23 (b) (1). Van Geinert v. Boening Co., 259 F. Supp. 125. Section 3 is reserved for adjudication of a controversy invovling the aggregation of individual claims, where there will be individual issues to be decided. Tober v. Charnita, Inc., 58 F.R.D. 74 (1973).

The Plaintiffs in the Berman case also qualified under several sections of Rule 23, and there the Court held that although almost all of the subsections of the rule applied, the action

B

The opinion of the Court below in no way disputed that this is properly a class action. It prevented it from proceeding as such, solely because of the timing of plaintiffs motion. Such a Draconian approach is without support and without parallel. Only where delay has been willful and a case is tainted by suspicion of bad faith and lack of bona fides, has the timing of the Rule 23 motion been a factor. Standing alone and especially as in our case, where it qualifies as a class action, where a delayed motion shows some justification and no claim was made that any one was prejudiced by a delay, a decision such as that made by the District Court here, has been uniformly denounced.

There were reasons here why the motion was not made sooner, which affected the meaning of "as soon as practicable." After the filing of the complaint, two motions were made attacking its sufficiency.

The complaint was finally upheld by Judge Lasker in 1971, at which point, for the first time, plaintiffs knew that they had a valid complaint upon which they could proceed. The propriety of this as a class action was raised by defendants before Judge Lasker, who decided it in plaintiffs' favor.

Thereafter the question of whether this case was properly brought as a class action was raised before the District Court under Rule 11(a) and the Court rejected the applicability of the rule. This question of class action was subsequently brought up before the Magistrate, who ruled that rule 11(a) was not applicable here, but no separate consideration or ruling was given at that time, to Rule 23.

Meanwhile, plaintiffs had promptly commenced discovery proceedings and took and completed the depositions of many of the defendants, as well as answering the extensive interrogotories propounded

by the defendants.

Some time later, at the suggestion of the Magistrate, an effort was made to get a pretrial order drawn and signed and plaintiffs submitted one which included a statement of this as a class action. Defendants objected to a pretrial order at that time and after further discussions with the Magistrate, it was decided that the parties could not agree upon an order, and it was dispensed with by the magistrate without objection from either of the parties.

From time to time, a number of other questions arose before the Magistrate with respect to evidence, discovery and other procedural matters which were disputed, without the making of formal motions. Presumably the Rule 23 order could have been made on the basis of discussions with the Magistrate, without the making of a formal motion and we were not unreasonable in hoping that it could be done in

this manner. However, when at the pretrial conference before Judge Knapp, he indicated that a formal motion should be made under Rule 23, we did so immediately.

The decision of Judge Tenney in Feder v. Harrington 52 FRD 178 (1970) is particularly applicable to our case and forcefully marshalls the reasons in support of plaintiff's position. He said:

> "With regard to plaintiffs' alleged delay in seeking class determination, defendants cite no authority and this Court is aware of none which requires withholding class determination solely because of a delay in bringing on the motion. While Rule 23 (c)(1) seeks to discourage unnecessary delays in moving for class determination, absent a showing of prejudice to either the class or the defendant, denying the motion would seem to be a harsh result which could prejudice the class. Moreover, plaintiff's conduct cannot be characterized as dilatory since she has completed discovery during the interim and is apparently ready for trial."

It is difficult to understand why the Court considered it necessary to protect the class in theory by means of an act which destroys it in practice. The rule specifically contemplates continued surveillance and authorizes the Court to make additions and amendments to its orders, providing additional or different safeguards and requirements, right up to the time of judgment. Thus, not only is the imposition of an arbitrary cut-off point not mandated but the opposite is true. Use of a narrow highly technical interpretation where no substantive reason appears for the decision is unusual and we suggest, deplorable.

> "...the interests of justice require that in a doubtful case, ...any error, if there is to be one should be committed in favor of allowing the class action.....it is within the power of the court to [later] limit either the issues or the parties ... or some other procedural device can be fashioned to meet the exigencies of the situation.
>
> Esplin v. Hirchi, 402 F2d 94, at 101 (1968)

"once the court is convinced that there is substantial merit to plaintiffs claims and that the class action device is the practicable method of vindicating these claims, it will not let procedural difficulties stand in its way."

Dolgow v. Anderson, 43 FRD 472 at 481 (1968)

Cases interpreting the words of Congress in FRCP 23 c (1) "As soon as practicable after the commencement of...a class action, the Court shall determine "whether it is to be so maintained, "leave no doubt that this phrase is not to be construed narrowly, but in a flexible fashion depending upon the situation of the parties and the circumstances of the litigation. In City of Inglewood v. City of Los Angeles, 451 F2nd 948 (1972), the Court, in commenting upon the lack of a Rule 23 determination for well over a year after the filing of the case, stated, "However, we realize that the requirement that such determination is to be made 'as soon as

practicable' leaves much room for discretion. It will obviously vary from case to case."

In Epstein v. Weiss, 13 FR Serv. 2nd 562 (1970), plaintiffs making a class action motion four years after the institution of the lawsuit, were challenged for timeliness. The Court noted that plaintiffs were engaged in necessary discovery in the interim, and furthermore, that the defendants had not been prejudiced by the delay nor made a claim that they had suffered thereby. The Court decided that the class action could proceed.

The cases cited by the defendants themselves (one of which was relied upon by the District Court) clearly illustrated that class action status will not be denied merely because of the timing of the Rule 23 motion. In Taub v. Glickman, 14 FR Serv. 2nd 870, (1970), (mentioned by the Court) quite apart from the question of the timing of the motion, plaintiff's attorneys had defaulted in answering calendar

calls, had defaulted in appearing in Court in support of their own Rule 34 motions for discovery and inspection and furthermore, were engaged in ethically questionable conduct.

Advise v. Mather 56 FRD (1972) was cited by defendants as an example of a recent case denying class status solely because of the timing of the Rule 23 motion. A reading of the entire case shows however, that the Court found a conflict of interest between the named plaintiff and the class, that individual questions dominated over the common questions of law and fact, and furthermore that there was demonstrated prejudice because of the lapse of time.

Even under the present local Civil Rule 11 A which is worded much more restrictively than FRCP 23, there is no requirement that the class action be dismissed in cases where a timely application is not made. As a matter of fact, Judge Motley

recognized this in Washington v. Weyman, 54 FRD 266, (1971). Plaintiff there had not made such an application, but nevertheless Judge Motley then allowed 20 additional days for the making of the motion. Of course, the failure of a plaintiff upon a specific Court order to make a Rule 23 motion by a certain date had occasioned dismissal of the class Herbst v. Able, 45 FRD 451, (1968). However, here we immediately complied with the Court's direction to bring this class action motion.

The approach taken by the Courts in reading Congress' words here is well illustrated in Berland v. Mack, 48 FRD 121 (1969). In deciding that the class action should be maintained, although the case had been filed three years before, the Court said:

> "In resolving the question of whether the requirements of Rule 23 F.R.Civ. P. are satisfied, we are mindful of declarations by the Court of Appeals for

this Circuit to the effect that the rule must be liberally construed with a view to enhancing the use of class actions as a means of vindicating rights of absent members who are unable for one reason or another, personally to prosecute ..."

Id. at 125

IV

THE RELIEF REQUESTED

A

Damages- Since the diversion of funds from the handle to pay exorbitant purses at Saratoga at the expense of the horsemen racing at Aqueduct and Belmont who generated them, is a clearly describable situation, both with respect to the nature of the diversion and the amount of money diverted, we have used this as the basis for computing damages. Our method has been to demand the repayment of the money diverted and to divide it proportionately among the horsemen who won purses at Saratoga.

Since, for the time being, the question of whether or not this is properly a class action is to be decided on appeal, we have computed on the record what the share of this money allocable to the two individual defendants would be, and demand those specific amounts on their behalf. If this is allowed

as a class action, the record also shows the amount of the damages to the class (from which the individual shares mentioned above, were derived).

B

The claim for injunctive relief remains in any case and if the Court finds an anti-trust violation, we believe that the methods of defendants denounced by us should be enjoined decreeing a separation of management of the NYRA from horsemen racing at its tracks and a cessation of the discriminatory practices and purse disbributions in which they engage at Saratoga. In our opinion, a minimum requirement would be that no trustee or officer of the NYRA should be permitted as an individual, to race his horses at those tracks in competition with others.

C

This should be permitted to proceed as a class action and remanded to the District Court for the purposes of notification to the class, fixing the exact dollar amount of damages and counsel fees, and the division of the damages awarded among the members of the class.

Respectfully submitted,

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New York, New York 10022
(212) 752-0740

Jesse Moss
Sue Wimmershoff-Caplan
Of Counsel

US COURT OF APPEALS SECOND CIRCUIT

KARLINSKY, et al,
Plaintiff-Appellants,

against

NEW YORK RACING ASS., et al,
Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortegá, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 20th day of December 1974 at 80 Pine Street, New York

deponent served the annexed Brief upon

Cahill, Gordon, Sonnett, Reindel & Ohe. Esqs.

the in this action by delivering 2 true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 20th day of December 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975